U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNETTE LOUISE and U.S. POSTAL SERVICE,
POST OFFICE, Lockport, NY

Docket No. 03-445; Submitted on the Record;
Issued August 26, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 11, 2001 appellant, then a 40-year-old dispatch clerk, filed a claim for an occupational disease, claiming that the condition of her feet was related to the dispatching she performed in December 2000. Appellant stopped work on February 22, 2001 and returned to work on a part-time basis on March 19, 2001.

In response to an April 25, 2001 Office request for further factual and medical evidence on her claim, appellant submitted a statement further describing the employment factors to which she attributed her condition. She also submitted medical reports from Dr. David Davidson, a podiatrist, and from Dr. Ashraf M. Sahaf, a Board-certified family practitioner.

In a March 14, 2001 note, Dr. Davidson stated that appellant "had foot surgery on February 23, 2001 and can return to work March 19, 2001 with no restrictions other than she can only work 6 hours a day until further notice." In a May 2, 2001 report, Dr. Davidson stated that appellant's "mid-tarsal joint pain in both feet … began last December during holiday time because of increased volume at work," that magnetic resonance imaging scan "failed to reveal any significant structural pathology"[1] and that appellant complained "that the pain is quite severe and constant and finds it difficult to walk." Dr. Davidson diagnosed "mid-tarsal synovitis, secondary to overuse," and recommended custom orthotics. In a May 30, 2001 report, Dr. Davidson stated: "She presents with significant mid-tarsal joint pain, which I feel is due to her work activities. Although custom orthotics may alleviate some of her complaints, she will never be 100 percent recovered." In a June 13, 2001 report, Dr. Sahaf stated that appellant had had multiple health problems since December 2000: "These include pain in both feet and legs.

[1] This testing was performed on April 24, 2001.

These pains seem to have been generated and later perpetrated by repetitive walking, carrying packages and rolling equipment."

By decision dated August 4, 2001, the Office found that appellant had not established that she sustained an injury as alleged, as the reports of Dr. Davidson "did not provide a history of the claimed condition nor did he explain how the condition found on examination was caused or aggravated by your [f]ederal employment."

By letters received by the Office on December 31, 2001 and January 3, 2002, appellant requested reconsideration of the Office's August 4, 2001 decision, contending that she had permanent damage to both her feet from dispatching mail in December 2000. Appellant submitted an October 11, 2001 notice from the employing establishment that she would be separated effective November 16, 2001 for her continued inability to perform the duties of her position as a distribution/window clerk.

By decision dated January 22, 2002, the Office found that the evidence submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision.

By letter dated July 18, 2002, appellant requested reconsideration and submitted a January 3, 2002 statement from a coworker describing the requirements of the dispatch position and stating that this was "the least desirable of all the bid jobs." Appellant also submitted a July 6, 2002 report from Dr. Davidson, who stated: "It is again my strong opinion that your foot type with significantly high arches has caused excessive impact on both feet creating your symptomatology. In other words, I strongly believe your work environment created the vast majority of your foot pain symptoms."

By decision dated October 17, 2002, the Office found that the additional evidence was insufficient to warrant review of its prior decision, as Dr. Davidson was "restating an opinion that was previously stated."

The only Office decisions before the Board on this appeal are the Office's January 22 and October 17, 2002 decisions, finding that appellant's applications for review were insufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on August 4, 2001 and the filing of appellant's appeal on November 25, 2002 the Board lacks jurisdiction to review the merits of appellant's claim.[2]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one-year of the date of the Office's final decision being appealed.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[3]

In its first volume of printed cases, the Board addressed what a claimant needs to submit in order to obtain a review of the merits of his or her claim. In *Daniel O'Toole*, the Board noted that "no criteria appear in any regulation of the Bureau[4] by which to test the sufficiency of an application for administrative review under section 37 of the Employees' Compensation Act[5] (that is, there is no regulation specifying the nature of such application and the formal prerequisites necessary to invoke action thereupon by the Director)…." After describing appellant's letter requesting reconsideration and the evidence accompanying it, the Board stated:

> "In any event, to constitute an application under section 37, properly invoking jurisdiction to act on the merits of the case, that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application. If the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient; if proffer of proof or documentary evidence is relied upon, it should appear that such showing as is made, if ultimately established, would have inherent probative value of a kind to make it calculable in resolving the weight of the evidence."[6]

In *O'Toole*, the Board found that there was no abuse of discretion in "refusing to accept the case for review on its merits,"[7] but in *Melvin C. Cox*, the Board found that appellant had submitted, with his request for reconsideration, "competent and substantial evidence having inherent probative value or worth, of a kind which makes it calculable in resolving the weight of

[3] The use of the word "may" in section 8128(a) of the Act underscores the intent of Congress that discretion be delegated to the Secretary and hence to the Office, to determine whether reconsideration should be granted; *see Kenneth L. Pless*, 45 ECAB 175 (1993) and cases cited therein.

[4] The Bureau of Employees' Compensation was the predecessor to the Office of Workers' Compensation Programs.

[5] Section 37 was the predecessor to section 8128 of the Act.

[6] 1 ECAB 107, 108 (1948).

[7] *Id.* at 109.

the evidence,"[8] and that the submission of such evidence "created a necessity for review of the full case record; that is, all of the evidence, in order properly to determine whether the newly supplied evidence, considered with that previously in the record, shifted the weight of the evidence in such manner as to require a modification of the earlier decision."[9] Similarly, in *Vernon Stewart*, the Board found, applying the test set forth in *O'Toole*, that new evidence submitted with a request for reconsideration was sufficient to warrant a review on the merits of the case. The Board then differentiated review on the merits from a nonmerit review: "The *weight* to be given to the evidence in support of the application is another question, one which the Bureau must consider in determining *after the review*, whether there has been a shift in the weight of the evidence, sufficient to require modification of the prior decision then undergoing review, or whether the evidence submitted falls short of sufficiency to require such modification because of some inherent lack of probative worth, absence of reliability, unsubstantial quality of the evidence, or other deficiency affecting its value as evidence or causing it not to shift the previously determined weight of the evidence."[10] (Emphasis in the original.)

Given the Office's discretion to review an award under section 8128(a) of the Act, the Board found that the Office could refuse to reopen a case for further review of the merits of the claim so long as such action was not arbitrary, capricious or unreasonable.[11] This abuse of discretion standard of review was applied when no new material evidence was submitted,[12] or when a "legal premise with reasonable color of validity not previously considered" was not presented.[13]

Conversely, the Board continued to find that the Office's discretion under section 8128(a) was limited. When new relevant evidence was submitted or new legal contentions were advanced, the Office had essentially no discretion; it was required to reopen the case for a review of the merits of the claim.[14] In *Daisy M. Tharp*,[15] the Board enunciated the standard applied in a multitude of subsequent cases:[16] "To require the [Office] to reopen a case for reconsideration,

[8] The Board also found that this new evidence "could not properly be rejected as 'cumulative,' as it did not tend to establish a fact as to which this physician had previously furnished like evidence…."

[9] 1 ECAB 138, 144 (1948).

[10] 1 ECAB 189, 191 (1948). The Board has continued to distinguish between the evidence required to warrant review and that required to warrant modification, stating in *Earl F. Smith*, 36 ECAB 261, 263 (1984) that "where relevant new evidence is submitted, it is necessary to review the case on the merits. If the Office should determine that such evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits."

[11] *Ella P. Felts*, 8 ECAB 492 (1956).

[12] *Arnulfo D. Guzman*, 11 ECAB 104 (1959).

[13] *Stanley C. Lillis*, 16 ECAB 17 (1964).

[14] *Cynthia L. Lee*, 15 ECAB 425 (1964).

[15] 27 ECAB 377, 378 (1976).

[16] *E.g., Eladio Joel Abrera*, 28 ECAB 401 (1977); *Edward Matthew Diekemper*, 31 ECAB 224 (1979); *Ethel D. Curry*, 35 ECAB 737 (1984); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

appellant must submit relevant evidence not previously of record or advance legal contentions not previously considered."

Board decisions have made it clear that the Office does not have discretion to refuse to reopen a case for a merit review when a claimant submits relevant evidence or legal contentions not previously considered. Given such submissions, the Office is "obligated to reopen a case"[17] and "may deny modification of the prior decision, but only after the case has been reviewed on the merits."[18] In *Leonard Redway*, the Board stated: "It is a fundamental principle of longstanding under the Act that a claimant has a right under section 8128 to secure review by the adjudicating agency of its decision where he presents new evidence relevant to his contention that the decision is erroneous."[19]

On April 1, 1987 the Office published amendments to its regulations in the Federal Register[20] and stated that a purpose of its new regulation under section 8128(a) of the Act was to formalize the limitations contained in Board decisions with respect to the evidence, which must be submitted in order to obtain review.[21] The new regulation,[22] which was effective June 1, 1987, is found at 20 C.F.R. § 10.138(b) and stated, in pertinent part:

> "(1) Under the discretionary authority granted by 5 U.S.C. § 8128(a), the Office may review an award for or against the payment of compensation on application of the claimant. No formal application for review is required, but the claimant must make a written request identifying the decision and the specific issue[s] within the decision, which the claimant wishes the Office to reconsider and give the reasons why the decision should be changed.… The claimant may obtain review of the merits of the claim by --
>
> > (i) Showing that the Office erroneously applied or interpreted a point of law, or
> >
> > (ii) Advancing a point of law or a fact not previously considered by the Office, or

[17] *Virginia Theus*, 30 ECAB 1424 (1979).

[18] *Earl F. Smith*, 36 ECAB 261 (1984).

[19] 28 ECAB 242, 246 (1977).

[20] This regulation was issued under the authority granted to the Office under section 8149 of the Act: "The Secretary of Labor may prescribe rules and regulations necessary for the administration and enforcement of this subchapter…."

[21] 52 Fed. Reg. 10,496 (1987).

[22] The previous regulation addressing review under section 8128(a), first issued in 1972, stated, in pertinent part: "An award for or against the payment of compensation may be reviewed by the Office under 5 U.S.C. § 8128(a) at any time, on its own motion or on application of the claimant. No formal application for review is required, but a written request for review, stating reasons why the decision should be changed and accompanied by evidence not previously submitted to the Office, is necessary to invoke action."

(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

"(2) Any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1) (i) through (iii) of this section will be denied by the Office without review of the merits of the claim."

The Board first addressed the propriety of 20 C.F.R. § 10.138(b)[23] in *Leon D. Faidley, Jr.*: "Since section 8128(a) of the Act does not mandate the Office to review a final decision simply upon request by a claimant, the Office is well within its authority to grant review upon claimant's request subject to certain requirements…."[24] In *Gregory Griffin*, the Board characterized this regulation as a "limitation on the Office's exercise of its discretionary authority or the granting to claimants of the right to merit review, subject to meeting the requirements of 20 C.F.R. § 10.138(b)(1)." The Board stated:

"By not delineating through statute the criteria by which the Office should or must grant or deny merit review of a claim, Congress has left it to the discretion of the Office to determine under what circumstances merit review of a claim is proper.… By delineating, through regulation, specific objective criteria by which a claimant may obtain merit review, the Office has administratively limited to an extent the element of discretion provided by section 8128(a) in determining whether to grant or deny a claimant merit review and has, in effect, granted a claimant an almost automatic right to merit review subject to the claimant meeting the requirements of section 10.138(b)(1)."[25]

On December 23, 1997 the Office published proposed amendments to its regulations.[26] With regard to reconsideration on application of a claimant, the notice of the proposed rules states: "The existing regulations contain a provision, carried over in § 10.608, limiting the right of a claimant to obtain a merit review and a new decision from OWCP to those situations in which the claimant meets one of the requirements set out in § 10.138(b)."[27]

[23] For a discussion of the Board's authority to review Office regulations, see *Rob D. Klinger*, 46 ECAB 693 (1995).

[24] 41 ECAB 104, 111-12 (1989). This decision addressed the one-year time limitation for requesting review contained in 20 C.F.R. § 10.138(b)(2). The Board compared the discretionary language of section 8128(a) with the mandatory language of section 8124(a), which states that a claimant is "entitled" to a hearing under certain circumstances.

[25] 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 461 (1990).

[26] 62 Fed. Reg. 67,120 (1997).

[27] 62 Fed. Reg. 67,127 (1997).

The new regulations were made effective January 4, 1999.[28] 20 C.F.R. § 10.606, titled "How does a claimant request reconsideration?" states:

> "(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision.
>
> "(b) The application for reconsideration, including all supporting documents, must--
>
> (1) Be submitted in writing;
>
> (2) Set forth arguments and contain evidence that either:
>
> (i) Shows that OWCP erroneously applied or interpreted a specific point of law;
>
> (ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."

20 C.F.R. § 10.608, titled "How does OWCP decide whether to grant or deny the request for reconsideration?" states impertinent part:

> "(a) A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). If reconsideration is granted, the case is reopened and the case is reviewed on its merits (see § 10.609).
>
> "(b) Where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, OWCP will deny the application for reconsideration without reopening the case for a review on the merits."

By issuing the above regulations, the Office has limited its discretion to review decisions under 5 U.S.C. § 8128(a) on motion of the claimant.[29] In section 10.606(b)(2) it has defined the standards under which it will grant a review on the merits and in section 10.608 made those the only circumstances under which a merit review will be granted on motion of the claimant. Having exercised its discretion by issuance of regulations, the only function left for the Office in an individual case is to determine whether an application for reconsideration meets the standards of the regulations. If it does, a review on the merits must be done; if it does not, a review on the merits will not be done. This determination does not involve discretion by the Office and having

[28] 63 Fed. Reg. 227 (1998).

[29] The Office did not limit its discretion to review decisions on its own motion, as seen in 20 C.F.R. § 10.610.

made this determination, the Office is under no requirement to further exercise its discretion with regard to an application for reconsideration.

The Office's exercise of its discretion by issuing regulations found at 20 C.F.R. §§ 10.606 and 10.608 is an appropriate exercise of the Office's delegated authority.[30] These regulations are not manifestly contrary to the Act,[31] given the intent of Congress[32] to give the Secretary of Labor, delegated to the Director of the Office, discretion to review awards for or against the payment of compensation. As the standards of 20 C.F.R. § 10.606(b)(2) for obtaining review are consistent with those in Board precedent[33] and do not infringe on the long-standing rights of claimants to obtain a review of the merits, the Office's issuance of this regulation does not constitute an abuse of the discretion granted to the Office by section 8128(a) of the Act.

The Office has appropriately exercised its discretionary authority under section 8128(a) of the Act by issuing regulations defining the limited circumstances under which it will grant a merit review upon application of a claimant. When reviewing an Office decision denying a merit review, the function of the Board is not to determine whether the Office abused its discretion but rather to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.

In the present case, appellant's applications for review of the Office's August 4, 2001 decision did not satisfy the standards of 20 C.F.R. § 10.606(b). Neither of her applications for review showed that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by the Office. The separation notice from the employing establishment for inability to perform her duties and a coworker's statement regarding the duties and desirability of appellant's former position are not relevant, as her claim was denied on the basis that the medical evidence did not establish that she sustained an injury as alleged.[34] With the exception of the observation that appellant has "significantly high arches," the July 6, 2002 report from Dr. Davidson is essentially repetitive of this doctor's earlier reports and suffers from the same deficiencies -- the lack of a history and an explanation

[30] In *Kenneth L. Pless*, *supra* note 3 (1993) the Board found that an Office regulation determining that lump-sum payments would not be made for loss of wage-earning capacity was an appropriate exercise of the Office's discretionary authority. In *Philip G. Feland*, 48 ECAB 485 (1997) and *Michael A. Wittman*, 43 ECAB 800 (1992) *order granting pet. for recons.*, the Board found that an Office regulation providing there was no right to reconsideration or a hearing after a final overpayment decision was an appropriate exercise of the Office's discretion.

[31] This standard is set forth in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 694 (1984).

[32] In *International Union, UAW v. Dole*, 919 F.2d 753 (D.C. Cir. 1990), the Court expressed its standard of review as determining whether the regulations in question were "rationally connected to the legislative ends."

[33] In *Leon D. Faidley, Jr.*, *supra* note 24 at 111, the Board noted that the requirements for obtaining review under the Office's regulation "parallel the requirements for an application for review as established by Board case law."

[34] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

of causal relation. For these reasons, this report is also not relevant and is, therefore, insufficient to require that the Office reopen the case for review of the merits of appellant's claim.[35]

The October 17 and January 22, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 26, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[35] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *Eugene F. Butler*, 36 ECAB 393 (1984).